

September 7, 2012

U.S. Department of Interior
Mike Pool, Acting Director (630)
Bureau of Land Management
Mail Stop 2134LM
1849 C Street, NW
Washington, DC 20240
Attention: 1004-AE26

Re: RIN 1004-AE26. Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Land, proposed rule published in the Federal Register on May 11, 2012 (77 Fed. Reg. 27691).

Dear Acting Director Pool;

On behalf of the Wyoming County Commissioners Association, an organization consisting of the Boards of County Commissioners of all 23 Wyoming counties, I respectfully submit the following comments in response to the Bureau of Land Management's proposed rule to regulate hydraulic fracturing on federal lands.

We believe that this proposed federal rule is unnecessary and unwarranted, as the State of Wyoming already has in place a robust hydraulic fracturing regulatory program. The vagueness in the proposed rule, especially related to how the BLM will issue or deny a hydraulic fracturing permit, and how the BLM intends to regulate hydraulic fracturing to "protect" and "mitigate" water quality impacts, leads to significant concerns of usurpation of the state's ownership and regulatory right over groundwater.

Under the Wyoming Constitution, which was ratified by Wyoming voters on November 5, 1889, and became effective on July 10, 1890, "[t]he water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state." Wyo. Const. Art. VIII, § 3. When Congress admitted Wyoming to the union in 1890 on equal footing, Congress accepted and ratified Wyoming's constitution, thereby assenting to the appropriation of the waters of the state to the government of Wyoming. *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 (1900).

In promulgating the hydraulic fracturing rule, the BLM intends to "protect all usable waters during drilling operations," an act which could usurp Wyoming's right under the Tenth Amendment of the United States Constitution to regulate its resources in the absence of clear constitutional or congressional intent for federal primacy over the resource. Since its adoption as a state in 1890, Wyoming has maintained primacy in matters related to the appropriation, administration and protection of water within its boundaries, including groundwater.

The Wyoming Legislature solidified Wyoming's right to regulate and ownership of groundwater in Article 9, Chapter 3, Title 31 of the Wyoming Statutes. On federal BLM land, the BLM is the surface owner, and likely the mineral estate owner; however, the BLM is not the owner, nor the regulator, of the groundwater underlying its surface and mineral estate. As such, any attempt by the BLM to assert primacy or regulatory authority over groundwater is an invasion upon the State of Wyoming's right to protect and regulate its waters.

In affirming its obligations to the residents of Wyoming for protection of the quality of Wyoming's groundwater, the State of Wyoming developed and implemented the nation's first hydraulic fracturing rules in 2010. The BLM should defer regulation of hydraulic fracturing to the State of Wyoming and should not create a parallel federal system that is unnecessarily duplicative and will likely increase well permitting delays and costs.

In addition to the statements offered above, we submit the following comments:

The BLM Lacks Authority

The BLM may not act independent of Congress in displacing established state jurisdiction to protect the quality of its groundwater. Absent clear congressional intent, a federal agency may not use its administrative authority to "alter the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-172 (2001). Because Congress has not demonstrated a specific intent to exercise its power to displace the State of Wyoming's primacy to regulate the quality of its groundwater, the BLM lacks authority to adopt rules that accomplish the same result.

The Federal Land Policy and Management Act (FLPMA) does not provide the BLM with sufficient authority to usurp state authority over the administration of the quality of its water. In fact, FLPMA specifically states that nothing in the Act shall be construed as "expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control [.]" 43 U.S.C. 1701. There exists no statutory authority, either under FLPMA or any other federal statute, which authorizes the BLM to promulgate rules to regulate the protection of state groundwater. That authority exists instead with the State of Wyoming.

While we maintain that the BLM does not have authority to usurp the State of Wyoming's right to regulate the quality of its groundwater for the reasons stated above, we offer the following comments on the proposed rule in the alternative.

Wyoming's Hydraulic Fracturing Rule

The State of Wyoming has led the nation in proactively regulating hydraulic fracturing. There was no requirement for Wyoming to develop hydraulic fracturing regulations. The Wyoming Oil and Gas Conservation Commission self-imposed stringent regulations after extensive consultation with all involved stakeholders and in concert with public involvement and comment. Wyoming's regulations, which were developed locally and are best suited to address the local nuances of oil and gas drilling in this state, were developed based on sound science and the protection of public health, safety and the environment.

Assessing the localized protections and mitigation measures necessary to ensure protection of Wyoming's water is best left to local state government, as opposed to the adoption of a one-size-fits all federal rule. State regulatory officials, who have specific statutory mandates to ensure protection of Wyoming's clean air, water and environment, as well as the conservation of the state's oil and gas resources, are in a far better position to regulate protection of the state's resources as opposed to the BLM, a federal public land management agency.

Application of Wyoming's regulations statewide would lead to greater consistency, as Wyoming's rule would be in place regardless of whether a proposed well is on federal, private, state or Indian lands. If the BLM were to require additional federal hydraulic fracturing rules in Wyoming, those rules would apply to federal, split estate and Indian lands only, leading to un-needed confusion and inconsistency, which will ultimately have a negative effect on the State's economic health.

BLM Budget and Staffing Concerns

As local government officials, we work very closely with the Wyoming BLM state and field offices, and we are all too familiar with their ever shrinking budgets, as well as their ever expanding work load. We have been told that the BLM will need to re-prioritize funding of its various programs in order to locate the resources needed to implement this new proposed regulatory program. We are extremely concerned that the local BLM budgets, which are already stretched too thin given the workload the BLM faces in Wyoming, will be severally impacted, and implementation of other key BLM programs will suffer or ultimately be eliminated.

As county commissioners in a western federal land state, we rely upon federal land managed by the BLM to sustain our local economy. The counties feel a direct impact when our local field offices are not provided with sufficient funding to implement their resource programs, particularly when the result is the delay in energy permit application approvals. Given the BLM's inability to provide its local offices with sufficient resources to keep up with its current work load, it is not appropriate for the BLM to create a new regulatory program which it cannot ensure adequate funding for efficient implementation.

Additionally, we question the BLM's ability to hire and maintain a workforce with sufficient knowledge and experience required to adequately regulate hydraulic fracturing. A nationwide regulatory program administered by the BLM, which is duplicative of already existing state programs, will have a hard time hiring, training and maintaining a staff sufficient to successfully implement the proposed regulations, which will result in permitting delays. State experts are already in place in Wyoming and in other states with hydraulic fracturing regulations. Unnecessary duplication of regulatory efforts will lead to an inadequate hiring pool of qualified professionals.

The State of Wyoming is in a far better position to fund and staff a hydraulic fracturing regulatory program. Both the Wyoming Governor's Office and the Wyoming Legislature have demonstrated a commitment to ensure adequate funding for implementation and staffing of this important state regulatory program. Given the financial and political situation in Washington, we question whether a similar commitment can be made by the federal government, particular by the BLM, given its ever shrinking national budget. A program of this magnitude cannot be efficiently carried out without the addition of highly skilled personnel who come at a premium in a competitive western job marketplace.

Delayed Permitting & Its Impact on Local Economies

As local government officials with direct responsibility for the economic stability of our counties, we are sensitive to the financial impact that this rule may have on our county income stream. Collectively we rely heavily on the revenue generated from the production of oil and gas in Wyoming and we, more than anyone, feel the economic impact associated with delays in permitting and production. Reductions and the revenue generated from oil and gas development has a direct impact on the services that we are able to provide for our residents, and thus the economic impacts associated with the implementation of this rule are felt the most at the local level.

Wyoming County Commissioners have concerns that the promulgation of this duplicative and unnecessary rule will cause delays in permit approval and will also likely discourage the development of some wells altogether. The loss of well development will have an obvious and significant impact on our counties' economic viability and cumulatively on the economic viability of our entire state economy, as the oil and gas industry contributed over \$2.4 billion dollars to the State of Wyoming through the payment of royalties and taxes and employed over 26,000 people statewide in 2011.

Defer to the State of Wyoming's Regulation of Hydraulic Fracturing

In response to the BLM's request for suggestions on how to avoid duplication with existing state regulatory schemes, we suggest that the BLM defer the regulation of hydraulic fracturing to the State of Wyoming. Locally developed, proactive regulations have the highest likelihood for successful protection of the water resource because they are best able to respond to localized impacts and issues, as opposed to attempting to implement a federal hydraulic fracturing rule on top of existing state regulations.

Alternatively, we suggest that you follow the precedent that has been set under the BLM's surface management regulations (43 C.F.R. 3809) and implement coordinated management of hydraulic fracturing in tandem with the State of Wyoming.

NEPA Concerns

The BLM is in error in determining that an Environmental Assessment (EA) is sufficient to analyze the impacts associated with this proposed rule. A nationwide rule of this magnitude and its coinciding economic and employment impacts certainly rise to the level of "Major Federal Action," and we therefore question the BLM's determination that an EA is sufficient, as opposed to an Environmental Impact Statement (EIS).

In closing, we feel strongly that the best regulations are those which are locally developed and locally implemented. The responsible government officials closest to the people are better able to determine what regulatory protections are most needed to ensure protection of the air, water and land quality of the local environment in which we live. The State of Wyoming hydraulic fracturing regulations are more than sufficient to protect our local environment and our residents, and duplicative federal legislation is

unneded, unwarranted and fiscally unsustainable for your Agency. Thank you for consideration of our comments.

Respectfully submitted,

Joel Bousman
President, Wyoming County Commissioners Association